

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

CLARENCE KNIGHT,

Petitioner,

v.

M.S. EVANS, WARDEN,

Respondent.

No. C 05-3670 SBA (PR)

**ORDER DENYING PETITION FOR  
WRIT OF HABEAS CORPUS AND  
DENYING REQUEST FOR JUDGMENT  
TO BE ENTERED**

(Docket No. 12)

**INTRODUCTION**

Plaintiff, an inmate at Salinas Valley State Prison, filed this pro se action seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter is now submitted for the Court's consideration of the merits of the petition. For the reasons discussed below the petition is DENIED.

**BACKGROUND**

On June 5, 1979, Petitioner was convicted in the San Diego County Superior Court for four counts of robbery and one count of grand theft of an automobile. (Resp't Ex. 1.) He is currently serving an indeterminate sentence. (Id.) The present petition does not challenge Petitioner's underlying conviction. Rather, it challenges the decision by prison officials,

1 following a prison disciplinary hearing, revoking 360 days of behavioral/work credit (so-called  
2 "good time credits"). The record supports the following findings.

3 On October 4, 2002, Correctional Officer McChristian filed a CDC-115 Rules Violation  
4 Report ("RVR"), log no. S02-10-0002, in which Petitioner was charged with possession of  
5 inmate manufactured weapons in violation of California Code of Regulations, title 15, section  
6 3006(a). Officer McChristian reported that, on October 4, 2002, while searching the cell  
7 occupied by Petitioner and his cellmate, Inmate White, Officer McChristian discovered two  
8 inmate made weapons under the bed sheets that were on the lower bunk. (Resp't Ex. 2.)  
9 Specifically, Officer McChristian's RVR stated,

10 On Friday, October 4, 2002, at approximately 1030 hours, while performing my  
11 duties as Security Squad Officer #10, I assisted Squad Officer R. Ramos in  
12 conducting a search in cell #148 occupied by Inmates Knight, C-07508, and  
13 White, P-58959. While searching the lower bunk assigned to Inmate Knight I  
14 began to remove his sheets from his mattress and heard Inmate Knight, who was  
15 located in a holding cell in the 'C' Section of the housing unit directly in front of  
16 cell #148 say, "She found it." Simultaneously as I pulled back the sheet from the  
17 mattress, I noticed a clear plastic bag. I opened the bag and discovered an object  
18 wrapped in toilet paper. As I unraveled the toilet paper from the object I  
19 identified it as two inmate made weapons. The inmate weapons consisted of a flat  
20 metal rolled into a cylinder and sharpened to a point on one end. The cylinders  
21 were attached to the handle of toothbrushes via string to form the handles. Both  
22 weapons measured in at approximately five (5) and three quarters (3/4) inches in  
23 length. I exited the cell leaving custody of the inmate made weapons to Officer  
24 R. Ramos. I returned to the cell approximately fifteen (15) minutes later after  
25 taking a series of photographs. Once inside the cell I photographed the weapons  
26 laying in the same position on the lower bunk bed as I had left them. I secured  
27 the weapon into a plastic evidence bag and placed the bag and weapons into an  
28 evidence tube. I then secured the evidence tube in my right hand. At  
approximately 1300 hours, I secured the two (2) weapons I recovered from the  
lower bunk of cell #148 into Main Evidence Locker #1 and one roll of 35mm film  
into the Main Evidence film drop box.

(Resp't Ex. 2.)

22 Petitioner requested that prison officials postpone the disciplinary hearing on these  
23 charges until the District Attorney rendered a decision about whether to prosecute.<sup>1</sup> (Resp't Ex.  
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25  
26 <sup>1</sup>Petitioner appears to contend that he later revoked this request but that prison officials did  
27 not comply with his revocation. (Pet'r at first Ex. A [see note 2, *infra*.] (CDC 602 Inmate Appeal  
28 Form at back of second attached lined sheet of paper) & (July 15, 2003, Memo. from C. Rouston to  
Knight at 6).) Even if true, this assertion is immaterial to the matter before the Court as Petitioner  
does not assert a formal claim based on this contention.

1 2.) On March 25, 2003, prison officials received notice that the District Attorney had declined to  
2 prosecute the weapons charge as a criminal offense. (Resp't Ex. 2.)

3 On April 21, 2003, a disciplinary hearing was held with respect to the October 4, 2002,  
4 RVR. (Id.) The Senior Hearing Officer ("SHO") was Lt. Kittner. (Id.) Petitioner pled not  
5 guilty. (Id.)

6 Petitioner asserts that, on July 18, 2002, he was placed in the Administrative Segregation  
7 Unit ("ASU") for an event unrelated to the weapons violation at issue in this case. (Pet'r second<sup>2</sup>  
8 Ex. A, Ex. B.) He remained in ASU for an extended time, in Petitioner's view, without  
9 justification. (Traverse at 4.)

10 On October 4, 2002, Officer McChristian conducted a search of his and Inmate White's  
11 cell. Petitioner claims that Officer McChristian searched the top bunk belonging to Inmate  
12 White *first* and that, in so doing, she placed some of the bedding from Inmate's White's bunk  
13 onto the lower bunk belonging to Petitioner. (Pet'r first Ex. A (Form CDC 602 and attached  
14 pages).) It is Petitioner's position that the inmate manufactured weapons discovered in his cell  
15 on October 4, 2002, belonged to his cellmate, Inmate White, that the weapons were in White's  
16 blankets, and that, when Officer McChristian moved Inmate's White's blankets to the lower  
17 bunk, the weapons were deposited on the lower bunk. (Id.)

18 Petitioner also submitted evidence of a second weapons violation. On December 4, 2002,  
19 Petitioner and Inmate White's cell was searched again, and the officer conducting that search  
20 discovered another inmate manufactured weapon. (Pet. Ex. C.) The RVR for this charge  
21 indicates that that weapon was found on the top bunk, Inmate White's bunk. (Id.) Moreover, the  
22 record supports a finding that Inmate White claimed ownership of this weapon. (Id.) Although  
23 the December 4, 2002 weapon violation was discovered after the violation that is the subject of  
24 this habeas petition (i.e., after October 4, 2002), the charges relating to that violation were heard  
25 on January 2, 2003, before prison officials heard the charges relating to the October 4th incident.

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27 <sup>2</sup>The attachments to Mr. Knight's Petition contain more than one exhibit "A," "E" and "F"  
28 and more than one "Attachment 1." For the sake of clarity, in citing the record the Court refers to  
the "first" or "second" "Attachment 1", "Exhibit A," "Exhibit E" and "Exhibit F."

(Id.) At the conclusion of the January 2, 2003 disciplinary hearing the Senior Hearing Officer, Lt. Kelsey, found Petitioner "not guilty" on the grounds that (a) Inmate White "took responsibility for the weapon" and (b) "there is no evidence that KNIGHT had knowledge of or was aware of the weapon." (Id.)

On April 21, 2003, Lt. Kittner conducted the hearing that is the subject of this petition. (Resp't Ex. 2.) Petitioner requested the presence of four witnesses at this disciplinary hearing: Inmate White, Officer McChristian, Sgt. Hamlin and Officer Ramos. (Resp't Ex. 2; Pet'r Ex. D.) Petitioner contends that Inmate White was prepared to testify at the April 21st disciplinary hearing and claim ownership of the weapons. (Resp't Ex. 2; Pet'r first Ex. A; Traverse at 3.) Inmate Knight also requested the admission of physical evidence, photographs "of the incident area and weapons" and photographs taken in reference to a separate incident, Log no. LAC-A05-02-10-0553.<sup>3</sup> (Resp't Ex. 2.) Finally, Petitioner presented a handwritten list of questions for each of his requested witnesses and for Lt. Kittner. (Resp't Ex. 2; Pet'r Ex. D & first Ex. F.) Lt. Kittner denied the requests to call Inmate White and Sgt. Hamlin as well as the request to introduce the photographs. (Resp't Ex. 2.) Lt. Kittner also declined to ask the remaining witnesses some of the questions proffered by Petitioner and declined to respond to the individual questions posed to him. (Id.) At the conclusion of the hearing Lt. Kittner found Petitioner guilty and "assessed 360 days loss of Behavioral/Work Credit consistent with the schedule provided in California Code of Regulations, title 15, section 3323 (Disciplinary Credit Forfeiture Schedule) for a Division 'A1' Offense." (Id.)

Petitioner contends that Lt. Kittner, motivated by a need to justify (retroactively) Petitioner's confinement in ASU, excluded witnesses and physical evidence that would exonerate Petitioner of the October 4, 2002 weapons violation, in order to support a guilty finding. (Traverse at 4; Pet'r Attach. 2 (pet. to Cal. Cts. of App.) and first Ex. A (form CDC 602 and attached pages).)

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<sup>3</sup>As far as the Court can discern this Log number does not correspond to either the October 4, 2002 or December 4, 2002 weapons violations.

1           Petitioner pursued administrative appeal of Lt. Kittner's decision. Prison Officials denied  
2           Petitioner's appeal at the "Second Level Review." (Pet'r first Ex. A.) Petitioner then sought  
3           "Director's Level Review" of the decision, but on November 5, 2003, officials rejected his appeal  
4           as untimely. (Pet'r first Ex. A (Form CDC 602) & second Attach. 1.)

5           Following rejection of his final administrative appeal, Petitioner sought habeas relief in  
6           state court. On May 14, 2004, the Los Angeles County Superior Court, primarily focusing on Lt.  
7           Kittner's denial of Petitioner's request to call Inmate White to testify, denied petitioner's state  
8           habeas petition on the ground that "[t]he hearing officer [Lt. Kittner] correctly ruled that [the  
9           excluded] evidence, if presented, would not have changed his opinion about the true owner of  
10          the contraband." (Resp't Ex. 4.) The California Court of Appeal for the Second District  
11          summarily denied Petitioner's habeas petition on June 8, 2004, and the California Supreme Court  
12          summarily denied Petitioner's habeas petition on June 22, 2005. (Resp't Exs. 6, 8.)

13          On September 13, 2005, Petitioner filed the instant petition (docket no. 1).<sup>4</sup> It is  
14          Petitioner's position that evidentiary decisions by Lt. Kittner violated Petitioner's right to due  
15          process in connection with the disciplinary hearing. Petitioner also asserts a claim for  
16          interference with his constitutional right to access to the courts based on prison officials'  
17          rejection of his administrative appeal at the "Director's Level." On January 17, 2008, the Court  
18          issued an order to show cause (docket no. 10). On February 19, 2008, the Respondent filed an  
19          Answer (docket no. 11). On March 6, 2008, Petitioner filed a Traverse (docket no. 13).

20                   **Petitioner's Request for Judgment to Be Entered and Grant Writ**

21          Before considering the merits of Mr. Knight's Petition for Writ of Habeas Corpus, the  
22          Court addresses Petitioner's February 22, 2008, Request for Judgment to Be Entered and Grant  
23          Writ (docket no. 12).

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26          <sup>4</sup>On September 22, 2005, Petitioner filed a Notice of Missing Documents (docket no. 5). In  
27          it Petitioner sought to confirm that the Court had before it all exhibits Petitioner had intended to  
28          attach. It appears that some pages of the documents were copied out of sequence but that all pages  
are part of the record. Therefore, the Court has before it the pages about which Petitioner inquired  
in his Notice of Missing Documents. (Pet'r Ex. D, first Exs. E-F, second Exs. E-F.)

1 In its January 17, 2008, Order to Show Cause and Granting In Forma Pauperis Status  
2 ("Order") (docket no. 10) the Court directed Respondent to file and serve its Answer to the  
3 Petition for Habeas Corpus within "thirty (30) days of the issuance of the Court's Order." Order,  
4 at 3:5-6. Respondent filed and served its Answer on Tuesday, February 19, 2008 (docket no.  
5 11).

6 On February 22, 2008, Petitioner filed his Request for Judgment to Be Entered and Grant  
7 Writ ("Request") (docket no. 12). In his Request, Petitioner asks the Court to grant his Petition  
8 for Writ of Habeas Corpus on the ground that Respondent did not timely file its Answer.<sup>5</sup> The  
9 Court FINDS Petitioner's Request appropriate for resolution without further briefing.

10 Petitioner appears to assume that the Court's Order was "issued" on January 16, 2008.  
11 (Req. at 1:16). If Petitioner is correct, Respondent would have been required to file its Answer  
12 by Friday, February 15, 2008. F.R.Civ.P. 6(a)(1).

13 Although the undersigned signed the Order on January 16th, the Order was not filed --  
14 and, therefore, did not become a matter of public record -- until the following day, January 17,  
15 2008. Moreover, the Clerk of the Court did not serve Respondent with a copy of that Order until  
16 January 23, 2008. See, docket entry for that date.

17 The Order cannot be deemed "issued" before it has become part of the public record.  
18 Therefore, the time for filing an Answer could not begin running prior to January 17, 2008.

19 Assuming that the Order was "issued" on the date that it was filed (despite the fact that  
20 the Clerk of the Court did not serve the Order until six days later), the Court FINDS that  
21 Respondent's Answer is timely. The Court ordered Respondent to file its Answer no later than  
22 thirty days after issuance of the Order. Counting from January 17, 2008, renders Respondent's  
23 Answer due on Tuesday, February 19, 2008. See F.R.Civ.P. 6(a)(1), (3) and (4).

24 Accordingly, Petitioner's Request is DENIED.

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26 <sup>5</sup>Petitioner signed his Request, mailed it to the Court, and served it on Respondent on  
27 February 20, 2008. The Court assumes that Mr. Knight had not yet received Respondent's Answer  
28 at the time he submitted the Request to the Court for filing and that he, therefore, was unaware that  
Respondent had filed an Answer. As of this date, Petitioner has not filed any notice withdrawing the  
Request. Therefore, the Court resolves Petitioner's Request on the merits.

1 The Court now proceeds to consider the merits of Petitioner's claim that prison officials  
2 denied his right to due process in connection with the prison's April 2003 revocation of "good  
3 time" credits and his claim that prison officials interfered with his right to access to the courts.

#### 4 **STANDARD OF REVIEW**

##### 5 **I. AEDPA**

6 Under the Antiterrorism and Effective Death Penalty Act (hereinafter "AEDPA"), a  
7 district court may grant a petition challenging a state conviction or sentence on the basis of a  
8 claim that was "adjudicated on the merits" in state court only if the state court's adjudication of  
9 the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable  
10 application of, clearly established Federal law, as determined by the Supreme Court of the  
11 United States; or (2) resulted in a decision that was based on an unreasonable determination of  
12 the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).  
13 A state court has "adjudicated" a petitioner's constitutional claim "on the merits" for purposes of  
14 § 2254(d) when it has decided the petitioner's right to post-conviction relief on the basis of the  
15 substance of the constitutional claim advanced, rather than denying the claim on the basis of a  
16 procedural or other rule precluding state court review on the merits. Lambert v. Blodgett, 393  
17 F.3d 943, 969 (9th Cir. 2004), cert. denied, 546 U.S. 963 (2005). It is error for a federal court to  
18 review de novo a claim that was adjudicated on the merits in state court. See Price v. Vincent,  
19 538 U.S. 634, 638-43 (2003).

20 In determining whether the state court's decision is contrary to, or involved an  
21 unreasonable application of, clearly established federal law, a federal court looks to the decision  
22 of the highest state court to address the merits of a petitioner's claim in a reasoned decision.  
23 LaJoie v. Thompson, 217 F.3d 663, 669 n.7 (9th Cir. 2000). In the case before us, the Los  
24 Angeles Superior Court was the highest state court to address the merits of Mr. Knight's claims  
25 in a reasoned decision. (Resp't Ex. 4.) The California Court of Appeal for the Second District  
26 and California's Supreme Court each summarily denied Mr. Knight's petition. (Resp't Exs. 6, 8.)

Where the state court gives no reasoned explanation of its decision on a petitioner's federal claim, a review of the record is the only means of deciding whether the state court's decision was objectively reasonable. See Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003); Greene v. Lambert, 288 F.3d 1081, 1088 (9th Cir. 2002). When confronted with such a decision, a federal court should conduct "an independent review of the record" to determine whether the state court's decision was an unreasonable application of clearly established federal law. See Himes, 336 F.3d at 853; accord Blodgett, 393 F.3d at 970 n.16. The court need not otherwise defer to the state court decision. "A state court's decision on the merits concerning a question of law is, and should be, afforded respect. If there is no such decision on the merits, however, there is nothing to which to defer." Greene, 288 F.3d at 1089. Nonetheless, "while we are not required to defer to a state court's decision when that court gives us nothing to defer to, we must still focus primarily on Supreme Court cases in deciding whether the state court's resolution of the case constituted an unreasonable application of clearly established federal law." Fisher v. Roe, 263 F.3d 906, 914 (9th Cir. 2001), overruled in part on other grounds by Payton v. Woodford, 346 F.3d 1204 (9th Cir. 2003), rev'd by Brown v. Payton, 544 U.S. 133 (2005). In this case the Los Angeles Superior Court explicitly addressed the merits of Petitioner's claim that Lt. Kittner unlawfully denied Petitioner's request to call Inmate White as a witness. However, the Superior Court did not give a reasoned explanation of its denial of Petitioner's claim with respect to requested physical evidence (photographs) or its denial of Petitioner's claim for interference with access to the courts.

**A. Challenges to Disciplinary Hearing Decisions**

Section 2254(d) applies to a habeas petition filed by a state prisoner challenging the loss of "good time" credits. Wolff v. McDonnell, 418 U.S. 539 (1974).

**B. Section 2254(d)(1)**

Challenges to purely legal questions resolved by the state court are reviewed under § 2254(d)(1), under which a state prisoner may obtain habeas relief with respect to a claim adjudicated on the merits in state court only if the state court adjudication resulted in a decision



1 that was "contrary to" or "involved an unreasonable application of" "clearly established Federal  
 2 law, as determined by the Supreme Court of the United States." Williams (Terry) v. Taylor, 529  
 3 U.S. 362, 402-04, 409 (2000). While the "contrary to" and "unreasonable application" clauses  
 4 have independent meaning, see id., at 404-05, they often overlap, which may necessitate  
 5 examining a petitioner's allegations against both standards. See Van Tran v. Lindsey, 212 F.3d  
 6 1143, 1149-50 (9th Cir. 2000), overruled on other grounds by Lockyer v. Andrade, 538 U.S. 63,  
 7 70-73 (2003).

### 8 **1. Clearly Established Federal Law**

9 "Clearly established Federal law, as determined by the Supreme Court of the United  
 10 States" refers to "the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of  
 11 the time of the relevant state-court decision." Williams, 529 U.S. at 412. "Section 2254(d)(1)  
 12 restricts the source of clearly established law to [the Supreme] Court's jurisprudence." Id. "A  
 13 federal court may not overrule a state court for simply holding a view different from its own,  
 14 when the precedent from [the Supreme] Court is, at best, ambiguous." Mitchell v. Esparza, 540  
 15 U.S. 12, 17 (2003). If there is no Supreme Court precedent that controls on the legal issue raised  
 16 by a petitioner in state court, the state court's decision cannot be contrary to, or an unreasonable  
 17 application of, clearly-established federal law. See, e.g., Stevenson v. Lewis, 384 F.3d 1069,  
 18 1071 (9th Cir. 2004).

19 The fact that Supreme Court law sets forth a fact-intensive inquiry to determine whether  
 20 constitutional rights were violated "obviates neither the clarity of the rule nor the extent to which  
 21 the rule must be seen as 'established'" by the Supreme Court. Williams, 529 U.S. at 391. There  
 22 are, however, areas in which the Supreme Court has not established a clear or consistent path for  
 23 courts to follow in determining whether a particular event violates a constitutional right; in such  
 24 an area, it may be that only the general principle can be regarded as "clearly established."  
 25 Andrade, 538 U.S. at 64-65. When only the general principle is clearly established, it is the only  
 26 law amenable to the "contrary to" or "unreasonable application of" framework. See id. at 73.

1 Circuit decisions may still be relevant as persuasive authority to determine whether a  
2 particular state court holding is an "unreasonable application" of Supreme Court precedent or to  
3 assess what law is "clearly established." Clark v. Murphy, 331 F.3d 1062, 1070-71 (9th Cir.),  
4 cert. denied, 540 U.S. 968 (2003); Duhaime v. Ducharme, 200 F.3d 597, 600 (9th Cir. 1999).

5 **2. "Contrary to"**

6 "Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court  
7 arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if  
8 the state court decides a case differently than [the Supreme] Court has on a set of materially  
9 indistinguishable facts." Williams, 529 U.S. at 413. A "run-of-the-mill state-court decision" that  
10 correctly identifies the controlling Supreme Court framework and applies it to the facts of a  
11 prisoner's case "would not fit comfortably within § 2254(d)(1)'s 'contrary to' clause." Id. at 406.  
12 Such a case should be analyzed under the "unreasonable application" prong of § 2254(d). See  
13 Weighall v. Middle, 215 F.3d 1058, 1062 (9th Cir. 2000).

14 **3. "Unreasonable Application"**

15 "Under the 'unreasonable application' clause, a federal habeas court may grant the writ if  
16 the state court identifies the correct governing legal principle from [the Supreme] Court's  
17 decisions but unreasonably applies that principle to the facts of the prisoner's case." Williams,  
18 529 U.S. at 413.

19 "[A] federal habeas court may not issue the writ simply because that court concludes in  
20 its independent judgment that the relevant state-court decision applied clearly established federal  
21 law erroneously or incorrectly. Rather, that application must also be unreasonable." Id. at 411;  
22 accord Middleton v. McNeil, 541 U.S. 433, 436 (2004) (per curiam) (challenge to state court's  
23 application of governing federal law must be not only erroneous, but objectively unreasonable);  
24 Woodford v. Visciotti, 537 U.S. 19, 25 (2002) (per curiam) ("unreasonable" application of law is  
25 not equivalent to "incorrect" application of law).

26 Evaluating whether a rule application was unreasonable requires considering the relevant  
27 rule's specificity; if a legal rule is specific, the range of reasonable judgment may be narrow; if it  
28

1 is more general, the state courts have more leeway. Yarborough v. Alvarado, 541 U.S. 652, 664  
 2 (2004). Whether the state court's decision was unreasonable must be assessed in light of the  
 3 record that court had before it. Holland v. Jackson, 542 U.S. 649, 651 (2004) (per curiam).

4 The "objectively unreasonable" standard is not a clear error standard. Andrade, 538 U.S.  
 5 at 75-76 (rejecting Van Tran's use of "clear error" standard); Clark, 331 F.3d at 1067-69  
 6 (acknowledging the overruling of Van Tran on this point). After Andrade, "[t]he writ may not  
 7 issue simply because, in our determination, a state court's application of federal law was  
 8 erroneous, clearly or otherwise. While the 'objectively unreasonable' standard is not self-  
 9 explanatory, at a minimum it denotes a greater degree of deference to the state courts than [the  
 10 Ninth Circuit] ha[s] previously afforded them." Id.

#### 11 **C. Section 2254(d)(2)**

12 A federal habeas court may grant the writ if it concludes that the state court's adjudication  
 13 of the claim "resulted in a decision that was based on an unreasonable determination of the facts  
 14 in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). An  
 15 unreasonable determination of the facts occurs where the state court fails to consider and weigh  
 16 highly probative, relevant evidence, central to the petitioner's claim, that was properly presented  
 17 and made part of the state court record. Taylor v. Maddox, 366 F.3d 992, 1005 (9th Cir. 2004).  
 18 A district court must presume correct any determination of a factual issue made by a state court  
 19 unless the petitioner rebuts the presumption of correctness by clear and convincing evidence. 28  
 20 U.S.C. § 2254(e)(1).

#### 21 **II. Exhaustion**

22 Prisoners in state custody who wish to challenge collaterally in federal habeas corpus  
 23 proceedings either the fact or length of their confinement are required first to exhaust state  
 24 judicial remedies, either on direct appeal or through collateral proceedings, by presenting the  
 25 highest state court available with a fair opportunity to rule on the merits of each and every claim

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27 //

1 they seek to raise in federal court. See 28 U.S.C. § 2254(b), (c). It is undisputed that Petitioner  
2 exhausted his state court remedies as to the claims raised in his federal petition. (Resp't at 2:24-  
3 25.)

## 4 **DISCUSSION**

### 5 **I. Existence of a Protected Liberty Interest**

6 Respondent does not dispute that Petitioner has a protected liberty interest in  
7 behavioral/work credits earned as a prisoner pursuant to California Penal Code § 2930, et seq.  
8 Thus, in accordance with Wolff v. McDonnell, 418 U.S. 539 (1974), Petitioner was entitled to  
9 the protection of due process at his April 21, 2003, disciplinary hearing.

### 10 **II. Due Process Claims**

#### 11 **A. Background**

12 Petitioner asserts that Lt. Kittner deprived him of his due process rights by denying his  
13 request to call his cellmate, Inmate White, as a witness at the April 21, 2003, disciplinary hearing  
14 and by denying Petitioner's request for certain photographs to be used as physical evidence. The  
15 Court addresses each of Petitioner's claims below.

16 Lt. Kittner also denied Petitioner's request to call Sgt. Hamlin and his request to ask  
17 certain questions to those witnesses who did testify and to ask various questions of Lt. Kittner.  
18 Petitioner has not asserted claims challenging these decisions. The Court addresses these  
19 decisions briefly, infra.

#### 20 **B. Applicable Legal Standard**

21 An inmate in California is entitled to due process before being disciplined when the  
22 discipline imposed will inevitably affect the duration of his sentence. See Sandin v. Connor, 515  
23 U.S. 472, 484, 487 (1995). Prisoners retain their right to due process subject to the restrictions  
24 imposed by the nature of the penal system. See Wolff, 418 U.S. at 556. Although prison  
25 disciplinary proceedings are not part of a criminal prosecution and the full panoply of rights due  
26 a defendant in such proceedings does not apply, where serious rules violations are alleged and  
27 the sanctions to be applied implicate state statutes or regulations which narrowly restrict the  
28

1 power of prison officials to impose the sanctions and the sanctions are severe, the Due Process  
2 Clause requires certain minimum procedural protections. See id. at 556-57, 571-72 n.19.

3 It is clearly established that a prisoner facing the loss of good time credits "must receive  
4 (1) advance written notice of the disciplinary charges; (2) an opportunity, when consistent with  
5 institutional safety and correctional goals, to call witnesses and present documentary evidence in  
6 his defense; and (3) a written statement by the factfinder of the evidence relied on and the  
7 reasons for the disciplinary action." Superintendent, Mass. Corr. Inst., Walpole v. Hill, 472 U.S.  
8 445, 454 (1985) (citing Wolff, 418 U.S. at 563-567).

9 With respect to the right to call witnesses and present documentary evidence the Wolff  
10 Court noted,

11 [T]he inmate should be allowed to call witnesses and present documentary  
12 evidence in his defense when permitting him to do so will not be unduly  
13 hazardous to institutional safety or correctional goals. Ordinarily, the right to  
14 present evidence is basic to a fair hearing; but the unrestricted right to call  
15 witnesses from the prison population carries obvious potential for disruption and  
16 for interference with the swift punishment that in individual cases may be  
17 essential to carrying out the correctional program of the institution. We should  
not be too ready to exercise oversight and put aside the judgment of prison  
administrators. . . . [H]ere we must balance the inmate's interest in avoiding loss  
of good time against the needs of the prison, and some amount of flexibility and  
accommodation is required. Prison officials must have the necessary discretion to  
keep the hearing within reasonable limits and to refuse to call witnesses that may  
create a risk of reprisal or undermine authority . . . .

18 Wolff, 418 U.S. at 566; see also Ponte v. Real, 471 U.S. 491 (1985). The Court further indicated  
19 that it would not be improper for prison officials to disallow evidence on the ground that it is  
20 irrelevant or unnecessary or because doing so would present hazards under the circumstances of  
21 the case. Wolff, 418 U.S. at 566. However, due process prohibits prison officials from  
22 arbitrarily denying an inmate's request to present witnesses or physical evidence. Hill, 472 U.S.,  
23 at 454-455; Bostic v. Carlson, 884 F.2d 1267, 1273 (9th Cir. 1988). It is the prison official's  
24 burden to prove that his decision denying the right to call a witness or introduce physical  
25 evidence was sufficiently justified. Ponte, 471 U.S. at 499.

26 In addition, due process requires that there be "some evidence" to support the disciplinary  
27 decision. Hill, 472 U.S. at 454. The relevant question is whether there is any evidence in the  
28

1 record that could support the conclusion reached by the disciplinary decision-maker. Hill, 472  
 2 U.S. at 455. See also discussion section C.4, infra.

3 In keeping with the Constitution's requirements, California's regulations concerning  
 4 discipline of prisoners provide explicit standards that narrowly fetter official discretion. Under  
 5 California Code of Regulations, title 15, section 3320(l), officials must find that a preponderance  
 6 of the evidence substantiates the charge before guilt may be found and punishment (e.g., loss of  
 7 good-time credits) assessed. See also 15 Cal. Code Reg. § 3320(a) (requiring notice), § 3320(b)  
 8 (requiring hearing). California's regulations also recognize the inmate's right to call witnesses  
 9 and present physical evidence where to do so would not threaten institutional concerns. See 15  
 10 Cal. Code Reg. § 3315(e)(1) ("Requested witnesses shall be called unless . . . (B) The official  
 11 determines that the witness has no relevant or additional information.") and § 3320(l) ("The  
 12 inmate may present documentary evidence in defense or mitigation of the charges."). See also  
 13 Cal. Penal Code § 2932(c). However, the Due Process Clause only requires that prisoners be  
 14 afforded those procedures mandated by Wolff and its progeny. It does not require that a prison  
 15 comply with its own, more generous procedures. See Walker v. Sumner, 14 F.3d 1415, 1419-  
 16 1420 (9th Cir. 1994), abrogated on other grounds by Sandin v. Connor, 515 U.S. 472 (1995).

### 17 **C. Analysis**

#### 18 **1. Decision Denying Request to Call Inmate White as a Witness**

19 The Los Angeles Superior Court rendered a reasoned explanation of its decision to  
 20 uphold Lt. Kittner's denial of Petitioner's request to call Inmate White as a witness. (Resp't Ex.  
 21 4.) The Superior Court's rejection of Petitioner Knight's claim that his right to due process was  
 22 violated because he was not permitted to call Inmate White as a witness at his disciplinary  
 23 hearing was not contrary to or an unreasonable application of clearly established federal law as  
 24 determined by the United States Supreme Court.

25 Petitioner was charged with possession of an inmate manufactured weapon. (Resp't Ex.  
 26 2.) The California Code of Regulations states, "[i]nmates may not possess or have under their  
 27 control any weapons, explosives, . . ." 15 Cal. Code Reg. § 3006(a) (emphasis added); see also  
 28

1 id. § 3315(a)(2)(D) ("The introduction or possession of . . . dangerous contraband" constitutes a  
 2 "serious rule violation."), § 3315(a)(3)(V) ("Unauthorized possession of materials or substances  
 3 which have been diverted or altered from the original manufactured state or purpose with the  
 4 potential to be made into a weapon" constitutes a "serious rule violation."), § 3323(b)(8)  
 5 ("Division A-1 offenses" include "possession or manufacture of a deadly weapon.").

6 Petitioner appears to contend that the hearing officer must identify some direct (as  
 7 opposed to circumstantial) evidence that the inmate owned the contraband before the officer may  
 8 hold the prisoner liable for contraband found in the cell. (Pet'r first Ex. A (back of second lined  
 9 sheet attached to form CDC 602).) Section 3006 does not assert that it is a violation to own  
 10 contraband. Section 3006 provides that it is a violation to possess or control contraband. The  
 11 term "control" adverts to the concept of constructive possession which in this setting has been  
 12 described as "a situation where it [the contraband] is not in the inmate's actual possession, but he  
 13 has reasonable control and/or access to it." (Resp't Ex. 2 (RVR Pt. C at 6-7).)<sup>6</sup> Furthermore, Lt.  
 14 Kittner need not base his finding on direct evidence. Hill, 472 U.S. at 456-457 (lack of direct  
 15 evidence did not violate due process). "The proposition that constructive possession provides  
 16 'some evidence' of guilt when contraband is found where only a few inmates have access is  
 17 unproblematical." Hamilton v. O'Leary, 976 F.2d 341, 345 (7th Cir. 1992); Hill, 472 U.S. at  
 18 456-457; Howard v. U.S. Bureau of Prisons, 487 F.3d 808 (10th Cir. 2007) (contraband found  
 19 among inmate's papers; possession established even if cellmates had access to area).

20 Inmates are responsible for contraband found anywhere in their cell. (Resp't Ex. 2  
 21 (Kittner RVR Pt. C at 7); Pet'r Ex. C (Kelsey RVR Pt. C at 2).) Moreover, inmates have areas of  
 22

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23 <sup>6</sup>Similarly, in his January 2, 2003 written report Lt. Kelsey says that constructive possession  
 24 "means one person retains control or ownership while it is in the actual possession of another."  
 25 (Pet'r Ex. C (Kelsey RVR Pt. C at 2).) This is in essence the same definition used by Lt. Kittner  
 26 requiring access or control, tailored to reflect the fact that in the case before Lt. Kelsey the weapon  
 27 was found in Inmate White's possession by virtue of having been found in his bunk (top bunk).

28 Citing no authority, Petitioner describes "constructive possession" as follows, "[i]f the  
 circumstances suggest the roommate should have been aware of the weapons or [sic] large enough to  
 notice and it was found in an area easily visible to anyone in the room." (Pet'r first Ex. A (back of  
 second lined sheet attached to form CDC 602).) Petitioner's definition contradicts the definitions  
 used by both Lt. Kittner and Lt. Kelsey in that Petitioner's definition focuses on evidence of the  
 inmate's "awareness" as opposed to "access" and "control."



1 responsibility within their cell (such as their bunks), and documents submitted by Petitioner  
 2 indicate that prison officials may presume that contraband found in an inmate's area of  
 3 responsibility is in the inmate's possession. (Pet'r Ex. C (Kelsey RVR Pt. C at 2).)

4 The evidence before Lt. Kittner supported a finding that Petitioner possessed the inmate  
 5 manufactured weapons. Lt. Kittner primarily relied on Officer McChristian's testimony that the  
 6 weapons were found in Petitioner's bunk. (Resp't Ex. 2 (RVR Pt. C at 7).) Petitioner requested  
 7 that his cellmate, Inmate White, appear as a witness. Lt. Kittner determined, however, that  
 8 Inmate White's proposed testimony would have been irrelevant to whether Petitioner possessed  
 9 or had under his control the inmate manufactured weapons found on October 4, 2002.

10 Petitioner sought to ask White the following questions.

- 11 1. During the time you and I were cellmates, did you ever see me with any
- 12 weapons?
- 13 2. At any time while we were cellies, were any weapons laying [sic] around our
- 14 cell in the open?
- 15 3. When you and I were in the cages during the cell search, you asked me a
- 16 question and I told you that ["]he found it!["] Do you recall the question that I
- asked you?<sup>7</sup>
4. What type of blankets did you have on your bed?
5. What type of blankets did I have on my bed?
6. While we were cellies, did I have any knowledge of any weapons being in cell
- A5-148?

17 (Pet'r first Ex. F; Resp't Ex. 2.)

18 Lt. Kittner denied Petitioner's request stating,

19 SHO finds that this witness would not provide any relevant or additional  
 20 information to this hearing. Whether or not White saw Knight with any weapons  
 21 or whether or not they were laying [sic] around in the cell are irrelevant to the  
 22 charged offense and would not exonerate Knight. SHO further finds that  
 questions #3 through #6 would not provide any additional or relevant information.  
 Therefore, this witness is denied (see Cal. Code Reg. Section 3321(e)(1)(B)).

23 (Resp't Ex. 2.)<sup>8</sup>

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24 <sup>7</sup>In light of the previous sentence, it appears that Petitioner meant "that you asked me."

25 <sup>8</sup>The quoted text is from Lt. Kittner's formal written decision following the April 21, 2003,  
 26 disciplinary hearing.

27 Petitioner attached to his petition documents in which he makes representations about oral  
 28 statements Lt. Kittner made to him pertaining to the decision to deny Petitioner's request to call  
 Inmate White. The last line of text of one such document was cut off when photocopied, and the  
 Court cannot read the last line. (Pet'r first Ex. A (second lined sheet attached to Form CDC 602).)



1 The Los Angeles Superior Court ruled,

2 Petitioner claims he was found guilty of a serious rules violation report (RVR) by  
3 false, biased and perjured testimony of all LAC-SP staff employees involved in  
4 this incident report. Although the contraband weapons were found secreted in  
5 petitioner's bunk by staff, it is petitioner's contention that the weapons were  
6 placed there by staff to "frame" him. In defense, he claims his cellie, if called as a  
7 witness, would have admitted the weapons belonged to him (the cellie). The  
8 hearing officer correctly ruled that this evidence, if presented, would not have  
9 changed his opinion about the true owner of the contraband.

10 (Resp't Ex. 4.)

11 None of the six questions that Petitioner intended to ask Inmate White at the April 21,  
12 2003, disciplinary hearing would have elicited testimony that could exonerate Petitioner for the  
13 charged offense. At the outset the Court notes that Petitioner chose not to ask Inmate White (1)  
14 whether the weapons discovered on October 4, 2002, belonged to him (White) or (2) whether  
15 those weapons had been hidden in White's blankets prior to their discovery -- the most pointed  
16 questions, questions that could inculcate White and exonerate Petitioner. These omissions  
17 suggest to this Court that White may not have been prepared to take responsibility for the  
18 weapons discovered on October 4, 2002.

19 Petitioner's first and second proposed questions sought to ask Inmate White whether he  
20 ever saw Petitioner with any weapons and whether any weapons were "laying around our cell in  
21 the open." (Pet'r first Ex. F; Resp't Ex. 2.) Neither the fact (if established) that White never saw

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22 The Court finds it unnecessary to require Petitioner to produce the original document because the  
23 record includes the RVR Pt. C containing Lt. Kittner's official statement of reason for his decision.  
24 Furthermore, Petitioner has attached at least three other documents purporting to describe Lt.  
25 Kittner's oral statements to Petitioner, and all of these documents indicate that Lt. Kittner's stated  
26 reason for excluding Inmate White's testimony was consistent with the official statement of reason  
27 set forth in the RVR Pt. C -- lack of relevance. (Pet'r first Ex. A (Apr. 17, 2003 letter from Knight to  
28 Yarborough) and (Feb. 19, 2004 Pet. for writ of habeas corpus to Super. Ct.); Attach. 2 (June 2,  
2004 Pet. for writ of habeas corpus to Cal. Cts. of App.))

29 In his Traverse, Petitioner also suggests that Lt. Kittner made comments that demonstrate  
30 that he was biased. Traverse at 8:15-18. Petitioner has not, however, asserted a formal claim that  
31 his due process rights were violated based on an allegation that the hearing officer was biased.  
32 Therefore, even if the missing text reflected some bias by Lt. Kittner it would not be relevant to the  
33 claims before this Court. The Court notes, however, that Petitioner accuses Lt. Kittner of using the  
34 October 4, 2002 weapons violation to support the decision of the officials at the California State  
35 Prison -- Los Angeles County to transfer Petitioner to Salinas Valley State Prison. Id. at 9. The  
36 record suggests that Petitioner was transferred to Salinas Valley State Prison as a result of racial  
37 tension arising from an unrelated incident that occurred before October 4, 2002. (Pet'r second Exs.  
38 A-B.)

1 Petitioner with weapons nor the fact (if established) that none were out in the open would have  
2 negated a finding that Officer McChristian found weapons hidden between the sheets and  
3 mattress of Petitioner's bunk.

4 Petitioner also sought to have White testify as to the type of blanket on each of their  
5 bunks (proposed questions 4 and 5). (*Id.*) The record indicates that it is Petitioner's position that  
6 Officer McChristian searched White's bunk first and placed blankets from his bunk onto  
7 Petitioner's bunk. Petitioner suggests that the weapons were hidden in White's blankets and that  
8 the weapons were deposited on Petitioner's bed by McChristian when she placed White's blanket  
9 there. Petitioner apparently intended to demonstrate (via these questions and the photographs  
10 discussed infra) that Petitioner and White used different types of blankets, and he proffered that  
11 the photographs would show that at the conclusion of the search White's blankets were on top of  
12 Petitioner's bunk. As explained in section 2, infra, even if Petitioner could have demonstrated  
13 that White's blankets were on top of Petitioner's bunk at the conclusion of the search this could  
14 not have exonerated Petitioner because a finding to this effect, at best, would be equally  
15 consistent with Petitioner's contention that Officer McChristian searched White's bunk first as  
16 with a finding that Officer McChristian searched Petitioner's bunk first.<sup>9</sup> Testimony establishing  
17 what type of blanket each cellmate used would not have assisted in establishing Petitioner's  
18 defense because it would not negate Officer McChristian's testimony that she found weapons  
19 hidden between the sheets and mattress of Petitioner's bunk.

20 Petitioner's sixth proposed question asked "did I [Petitioner] have any knowledge of any  
21 weapons being in cell A5-148?" White's response to this question would not have provided  
22 information relevant to whether Petitioner possessed or controlled the weapons found on October  
23 4, 2002, because, among other things, White could not credibly testify as to what was in  
24 Petitioner's mind. White did not have personal knowledge of what Petitioner did or did not  
25 know.

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27  
28 <sup>9</sup>Officer McChristian did not make any representations about searching White's bunk in her  
October 4, 2002 RVR.

1           Petitioner's proposed third question is the only question that arguably could have elicited  
2 testimony that might tend to support one aspect of Petitioner's version of the events on October  
3 4, 2002. Petitioner sought to ask White, "When you and I were in the cages during the cell  
4 search, you asked me a question and I told you that ["]he found it!["] Do you recall the question  
5 that I asked you?"<sup>10</sup> (Resp't Ex. 2.) Officer McChristian asserted that she heard Petitioner say,  
6 "She found it" while she was removing the sheets from his bunk and locating the weapons. (*Id.*)  
7 Both Officer McChristian and Lt. Kittner viewed this as circumstantial support for a finding that  
8 Petitioner knew the weapons were in his bunk. (*Id.*) Petitioner contends that his statement did  
9 not pertain to the weapons. According to Petitioner, when they were in the holding cell, White  
10 asked him whether he (Petitioner) had the tobacco ("bugler"). Petitioner asserts that he saw  
11 Officer Ramos find the tobacco, and therefore, Petitioner responded to White's question with "he  
12 found it." (Pet'r Ex. D, first Ex. F; Resp't Ex. 2 (RVR Pt. C at 4) (emphasis added).)<sup>11</sup>

13           Lt. Kittner considered the statement "she found it" an "admission" by defendant. (Resp't  
14 Ex. 2 (RVR Pt. C at 6).) Accordingly, testimony by White corroborating Petitioner's assertion  
15 that he stated "he found it" in response to a question about tobacco and not in reference to the  
16 weapons, if deemed credible, could have negated Lt. Kittner's finding that Petitioner made an  
17 admission indicating he was aware of the weapons. However, even if Petitioner established that  
18 the statement "she [or he] found it" did not pertain to the weapons, this would not have proved  
19 that Petitioner was unaware of the weapons. At best, there would have been no evidence tending  
20 to support an affirmative finding about whether Petitioner was or was not aware of the weapons.  
21 An absence of evidence on this issue would not have negated Lt. Kittner's finding that the  
22 weapons were discovered in Petitioner's bunk, and, therefore, White's response to this question  
23 could not have exonerated Petitioner.

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26           <sup>10</sup>See note 7 *infra*.

27           <sup>11</sup>According to Lt. Kittner, Petitioner told him that White's question related to Pruno (as  
28 opposed to tobacco). (Resp't Ex. 2 (RVR Pt. C at 6).) The distinction is not significant to the  
Court's analysis. However, to the extent Petitioner's story has changed, this would undermine his  
credibility on this point. The Court makes no finding on this issue at this time.

1 Lt. Kittner clearly stated that Officer McChristian's testimony that she found the weapons  
2 in Petitioner's bunk constituted the basis for his decision that Petitioner was "guilty" and that the  
3 so-called admission only "corroborated" that conclusion. (Resp't Ex. 2 (RVR Pt. C at 7).) He  
4 further stated that even if Petitioner's statement "she [or he] found it" was made in relation to  
5 tobacco (or Pruno) that would not have changed his finding that Petitioner was guilty of  
6 possessing weapons where credible evidence supported a finding that the weapons were in  
7 Petitioner's bunk. (Id.) Because Petitioner's proposed third question was irrelevant to whether  
8 he possessed or had control over the weapons by virtue of them being located in his bunk, Lt.  
9 Kittner's decision to exclude White's testimony on this subject did not constitute a violation of  
10 Petitioner's constitutional rights.

11 Petitioner appears to view White's response to this third question as relevant in part based  
12 on the findings of Lt. Kelsey, the officer who presided over the disciplinary hearing pertaining to  
13 the December 4, 2002 weapons violation. It is true that Lt. Kelsey found Petitioner not guilty in  
14 part on the ground that there was no evidence that Petitioner was "aware" of the weapons found  
15 in White's bunk. (Pet'r Ex. C (Kelsey RVR Pt. C at 2.) Nonetheless, Lt. Kelsey's finding does  
16 not necessarily reflect a requirement that prison officials identify evidence demonstrating the  
17 inmate's awareness in order to establish a weapons violation. In the case before Lt. Kelsey,  
18 Petitioner could have been responsible for anything in the cell. However, because direct  
19 evidence in the form of White's admission together with the presumption that the weapons were  
20 in White's possession (by virtue of being in his bunk) tended to contradict a finding that  
21 Petitioner possessed or controlled the weapons in White's bunk, Lt. Kelsey found the lack of  
22 evidence about Petitioner's awareness material. Lt. Kelsey's decision is distinguishable from Lt.  
23 Kittner's ruling because Lt. Kelsey found that Petitioner was not guilty of possessing an inmate  
24 weapon where the weapon was discovered in the top bunk belonging to Inmate White and  
25 Inmate White directly stated that the weapon was his. (Pet'r Ex. C (Kelsey RVR Pt. C at 2).)<sup>12</sup>  
26

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27 <sup>12</sup>Lt. Kittner stated in his decision that he could have found Petitioner guilty even if Officer  
28 McChristian had discovered the weapon in the top bunk belonging to White. (Resp't Ex. 2 (RVR Pt.  
C at 7).) This statement reflects the proposition that inmates are responsible for anything in their

1 For the reasons stated, Petitioner has not demonstrated that Inmate White's responses to  
2 Petitioner's proposed questions could have presented testimony that would exonerate him by  
3 contradicting a finding that Officer McChristian found the weapons in his bunk or by otherwise  
4 demonstrating that he did not possess or control the weapons. Bostic v. Carlson, 884 F.2d 1267  
5 (9th Cir. 1989) (Exclusion of crucial witness was not an error where information given by inmate  
6 about witness' testimony did not demonstrate how testimony would assist defense.); Piggie v.  
7 Cotton, 344 F.3d 674, 678 (7th Cir. 2003) (Exclusion was not error where inmate did not  
8 indicate how witness would have aided defense.); Hudson v. Hedgepath, 92 F.3d 748, 752 (8th  
9 Cir. 1996) (Witness statement was unnecessary because it would not have provided defense.);  
10 Chesson v. Jaquez, 986 F.2d 363, 366 (10th Cir. 1993) (No due process violation shown where  
11 inmate failed to demonstrate how witness' testimony would have affected the outcome of his  
12 case.).

13 Petitioner also complains that Lt. Kittner excluded White's testimony as irrelevant  
14 without interviewing White to determine what he would say. Lt. Kittner did not need to  
15 interview Inmate White because Petitioner had provided the list of questions that he intended to  
16 ask his cellmate. Lt. Kittner reliably could have determined that even responses to those  
17 questions that fully supported Petitioner's version of events would not have negated a finding  
18 that Officer McChristian found the weapons in Petitioner's bunk and would not have otherwise  
19 demonstrated that Petitioner did not possess or control the weapons.

20 Moreover, although Petitioner complains that Lt. Kittner did not interview Inmate White  
21 prior to making a relevancy determination, Petitioner had an opportunity to cause prison officials  
22 to interview White and, therefore, to present White's statement to Lt. Kittner (at least in written  
23

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24 cell, as both Lt. Kittner and Lt. Kelsey noted. However, where, as Lt. Kelsey found, direct evidence  
25 tends to negate a finding that an inmate possessed or controlled contraband (e.g., White's  
26 admission), such evidence might make a finding that the inmate "possessed" the contraband so  
27 unreliable as to violate Hill's "some evidence" standard in the absence of evidence that the inmate  
28 was aware of the contraband. Inmate White's responses to Petitioner's proposed questions would not  
have provided such direct evidence. Accordingly, Lt. Kittner's statement appears consistent with  
due process. Nonetheless, given that credible evidence established that the October 4, 2002  
weapons were located in Petitioner's bunk, the Court need not resolve this issue.

1 form) when he directed the staff investigator whom to interview. Nonetheless, the record  
2 supports a finding that Petitioner did not ask the staff investigator assigned to his case to  
3 interview Inmate White. (Pet'r Ex. D (Investigative Employee's Report).) The fact that  
4 Petitioner did not direct the staff investigator to interview White further suggests to this Court  
5 that White may not have been prepared to take responsibility for the October 4, 2002 weapons  
6 violation.<sup>13</sup>

7 Finally, prison officials' errors in denying a request to call a witness are subject to  
8 harmless error review. Howard, 487 F.3d at 813 (citing Grossman v. Bruce, 447 F.3d 801 (10th  
9 Cir. 2006)); Powell v. Coughlin, III, 953 F.2d 744 (2nd Cir. 1991). Accordingly, even if Lt.  
10 Kittner erred in declining to allow Inmate White to testify, the Court must deny Petitioner's  
11 request for a writ of habeas corpus if the error was "harmless."

12 A deprivation of due process will be harmless and a habeas petition will be denied unless  
13 the error had a "substantial and injurious effect or influence in determining the [factfinder's]  
14 verdict." Brecht v. Abrahamson, 507 U.S. 619, 637 (1993).

15 None of Inmate White's responses to the questions Petitioner sought to pose would have  
16 negated Officer McChristian's testimony that she found the weapons in Petitioner's bunk. Lt.  
17 Kittner (the factfinder) concluded that Officer McChristian's testimony was credible, and it  
18 served as the basis for his ruling. Testimony about what type of blankets each inmate used  
19 (together with the excluded photographs discussed infra), at best, would have presented evidence  
20 equally consistent with Officer McChristian's and Petitioner's versions of the events. The only  
21 testimony by Inmate White that affirmatively could have assisted Petitioner would have been  
22 corroboration for his claim that his statement "she [or he] found it" pertained to tobacco and not  
23 to the weapons. However, as noted above, while testimony to that effect (if believed) would  
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25  
26 <sup>13</sup>The record supports a finding that, on April 8, 2003, when the staff investigator  
27 investigating the October 4, 2002 violation spoke to Petitioner, Petitioner was aware that the staff  
28 investigator assigned in connection with the December 2002 weapons violation had interviewed  
White. (Pet'r Ex. C (Dec. 19, 2002 Investigative Officer Report.) Petitioner also was aware that  
White had directly stated that the weapons at issue in that incident were his. (Pet'r Ex. C (Kelsey  
RVR Pt. C at 2.)

1 have eliminated evidence supporting a finding Petitioner was aware of the weapons, it would not  
2 have proven the opposite -- i.e., that Petitioner was unaware of the weapons. Grossman, 447  
3 F.3d at 805 (error excluding witness harmless where excluded testimony would not have aided  
4 defense); Piggie, 344 F.3d at 678. Therefore, the excluded testimony would not have  
5 contradicted a finding that Petitioner possessed or controlled the weapons. Accordingly, the  
6 Court cannot find that exclusion of White's testimony had a "substantial and injurious effect or  
7 influence in determining the [factfinder's] verdict."

8 Additionally, an error is harmless where the factfinder would have reached the same  
9 verdict absent the error. Gray v. Klauser, 282 F.3d 633, 654-655 (9th Cir.), vacated on other  
10 grounds, 537 U.S. 1041 (2002). In his formal decision, Lt. Kittner stated that, even absent  
11 Petitioner's statement ("she [or he] found it"), he would have found Petitioner guilty based on  
12 Officer McChristian's testimony that the weapons were hidden in Petitioner's bunk. Any error in  
13 failing to call Inmate White as a witness was harmless.

14 The Court finds that the state court's decision denying Petitioner's state petition for  
15 habeas corpus and finding that Lt. Kittner did not err in declining to allow Inmate White to  
16 testify and/or that any such error was harmless was not an unreasonable application of clearly  
17 established federal law as determined by the Supreme Court.

18 The Court DENIES Mr. Knight's petition to the extent based on this claim.

19 **2. Decision Not to Provide Requested Photographs**

20 The state court did not explicitly address Petitioner's claim that Lt. Kittner violated his  
21 due process rights by excluding the requested photographs. This Court conducts an independent  
22 review of the record and determines whether the state court's implicit denial amounts to an  
23 unreasonable application of clearly established federal law as determined by the Supreme Court.

24 Petitioner sought to use two sets of photographs at the April 21, 2003, disciplinary  
25 hearing. According to petitioner, the first set of photographs that he requested depicted inmate-  
26 made weapons discovered in a search other than the search on October 4, 2002. Lt. Kittner  
27 denied Petitioner's request that he consider these photographs on the ground that they "would not  
28



1 add additional or relevant information." (Resp't Ex. 2.) Petitioner asserts that the weapons  
2 depicted in this unrelated search are "identical" to those found on October 4, 2002, and  
3 represents that his cellmate, Inmate White, "owned up to them." (Pet'r first Ex. A (second lined  
4 paper attached to form CDC 602).) In Petitioner's view, if the weapons that White purportedly  
5 "owned up to" are the same kind of weapon as those found on October 4, 2002, then these  
6 photographs present circumstantial evidence that could support an inference that the weapons  
7 found on October 4, 2002 also belonged to White as opposed to Petitioner.

8 Even if the weapons depicted in these photographs look like those found on October 4,  
9 2002, the photographs would not have provided Lt. Kittner with additional relevant information.  
10 The weapons found on October 4, 2002, and attributed to Petitioner, were sharpened pieces of  
11 metal attached to a toothbrush handle. Inmate manufactured weapons are commonly made from  
12 sharpened pieces of scrap metal ("shanks") attached to make-shift handles such as a toothbrush  
13 handles. E.g., U.S. v. Rojas-Flores, 384 F.3d 775 (9th Cir. 2004); U.S. v. Sahakian, 453 F.3d  
14 905 (7th Cir. 2006); Madsen v. McGrath, 2008 WL 681886 (S.D. Cal.) (referencing testimony to  
15 the effect that inmates frequently attach sharpened metal to items such as toothbrush handles to  
16 use as weapons). Therefore, the fact that the weapons purportedly claimed by White in another  
17 incident and those found on October 4, 2002 were the same type of weapon would not have  
18 provided more than de minimis support for an assertion that the weapons found on October 4,  
19 2002 belonged to White and not to Petitioner and would not have been exculpatory.

20 The second category of photographs Petitioner requested were photographs of his and  
21 White's cell following discovery of the weapons on October 4, 2002. Lt. Kittner also found that  
22 these photographs would not have provided additional or relevant information. (Resp't Ex. 2.)  
23 Petitioner contends that these photographs might have shown that there were wool blankets on  
24 his bunk. (Pet'r at first Ex. A (back of second lined paper attached to form CDC 602).)  
25 Petitioner argues that because he used cotton blankets and White used wool blankets, the  
26 photographs would demonstrate that Officer McChristian did place Inmate White's blankets on  
27 Petitioner's bunk as Petitioner contends. In Petitioner's view this demonstration would support  
28



1 his allegation that Officer McChristian searched Inmate White's top bunk first, set White's  
2 blankets on Petitioner's lower bunk and, in so doing, deposited weapons secreted in White's  
3 blankets onto Petitioner's bed.

4 Petitioner does not dispute that the photographs were taken at the conclusion of the  
5 search. (Resp't Ex. 2 (Oct. 4, 2002 RVR by Officer McChristian).) As a result, even if the  
6 photographs demonstrated that White's wool blankets were on Petitioner's lower bunk, this  
7 evidence would not have proved that Officer McChristian searched White's bunk first. Officer  
8 McChristian could have searched White's bunk after searching Petitioner's bunk and placed  
9 White's blankets on top of Petitioner's bunk as she removed those blankets in order to view  
10 White's sheets.<sup>14</sup> If Officer McChristian had searched Petitioner's bunk after searching White's  
11 bunk, as Petitioner asserts, presumably she would have had to remove White's blankets and  
12 return them to the top bunk in order to access Petitioner's bunk. Consequently, if White's  
13 blankets remained on the lower bunk at the conclusion of the search the photographs also could  
14 tend to support an inference that White's bunk was searched last. At best, the photographs would  
15 be equally consistent with Petitioner's contention that Officer McChristian searched White's  
16 bunk first as with a scenario in which Officer McChristian searched Petitioner's bunk first. The  
17 photographs, therefore, could not have exonerated Petitioner.

18 Because none of the photographs would have assisted materially in establishing  
19 Petitioner's alleged defense it was not error to exclude them.

20 Moreover, even if Lt. Kittner erred by excluding the photographs the error was harmless.  
21 For the reasons just explained, none of the photographs Petitioner requested could have negated  
22 a finding that the weapons were found in Petitioner's bunk. Therefore, failure to admit them  
23 could not have had a substantial and injurious effect on Lt. Kittner's decision.

24 The Court finds that the state court's decision denying Petitioner's state petition for  
25 habeas corpus and implicitly finding that it was not error to exclude the requested photographs  
26

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27  
28 <sup>14</sup>See note 9, supra.

1 and/or that any such error was harmless was not an unreasonable application of clearly  
2 established federal law as determined by the Supreme Court.

3 The Court DENIES Mr. Knight's petition to the extent based on this claim.

4 **3. Other Decisions to Exclude**

5 Petitioner has not asserted a claim based on Lt. Kittner's denial of Petitioner's request to  
6 call Sgt. Hamlin as a witness or a claim based on Lt. Kittner's denial of Petitioner's request to  
7 pose certain questions to Officer Ramos, Officer McChristian, or Lt. Kittner. However, in his  
8 Traverse and in documents attached to his petition, Petitioner seems to allege that at least some  
9 of these decisions by Lt. Kittner were unjustified. (Traverse at 5; Pet'r Attach. 2 (Pet. for habeas  
10 corpus to Cal. Cts. of App.) & first Ex. A (Pet. for habeas corpus to Super. Ct.).)

11 The state court's decision denying Petitioner's state petition does not explicitly address  
12 any of these decisions by Lt. Kittner.<sup>15</sup> To the extent the state court considered the merits of an  
13 argument that these decisions deprived Petitioner of his right to due process the state court's  
14 decision would not be an unreasonable application of clearly established federal law.

15 Although Petitioner has a limited right to call witnesses at a disciplinary hearing, there is  
16 no clearly established law entitling Petitioner to ask questions of the hearing officer, Lt. Kittner.  
17 In any event, Lt. Kittner, in effect, responded to Petitioner's questions by stating "SHO conducts  
18 each hearing utilizing the mandated procedural safeguards." (Resp't Ex. 2 (RVR Pt. C at 2).)

19 With respect to Sgt. Hamlin, Officer McChristian and Officer Ramos, these witnesses are  
20 adverse to Petitioner. It is uncontroverted that prisoner's have no right to confront or cross-  
21 examine adverse witnesses at a prison disciplinary hearing. Wolff, 418 U.S. at 567-568.  
22 Although the California Penal Code provides that the inmate has the right "to question all  
23 witnesses," the Due Process Clause only requires that prisoners be afforded those procedures  
24 mandated by Wolff and its progeny. Cal Penal Code §2932(c)(4); 15 Cal. Code Reg.  
25 §3315(e)(5); see also Walker, 14 F.3d at 1419-1420, abrogated on other grounds by Sandin v.  
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28 <sup>15</sup>This omission is not surprising given that Petitioner did not assert any claims based on these decisions.

1 Connor, 515 U.S. 472 (1995). Furthermore, none of the questions excluded by Lt. Kittner were  
 2 relevant to the issue of whether Petitioner did or did not possess inmate weapons in his bunk on  
 3 October 4, 2002.

4 Petitioner was not deprived of the ability to put on a defense. Lt. Kittner permitted  
 5 Petitioner to make a statement on his own behalf and to pose relevant questions to the officers  
 6 who discovered the weapons. Petitioner has not established that any of Lt. Kittner's decisions  
 7 were unlawful.

#### 8 **4. "Some Evidence"**

9 The Supreme Court has held that the revocation of good time credits does not comport  
 10 with the minimum requirements of procedural due process in Wolff unless the findings of the  
 11 prison disciplinary officer are supported by "some evidence" in the record. Hill, 472 U.S. at 454.  
 12 The "some evidence" standard refers to evidence from which the conclusion of the decision-  
 13 maker could be deduced. Hill, 472 U.S. at 455. An examination of the entire record is not  
 14 required nor is an independent assessment of the credibility of witnesses or weighing of the  
 15 evidence. Id. The relevant question is whether there is any evidence in the record that could  
 16 support the conclusion reached by the disciplinary decision-maker. Id. at 455. This standard is  
 17 considerably lower than that applicable in criminal trials. Id. at 456. The Ninth Circuit  
 18 additionally has held that the information that forms the basis for prison disciplinary actions  
 19 must bear some indicia of reliability. Cato v. Rushen, 824 F.2d 703, 704-05 (9th Cir. 1987).<sup>16</sup>

20 Petitioner contends that the state court erred by finding that there was sufficient evidence  
 21 in the record to support the hearing officer's ruling that Petitioner possessed the inmate made  
 22 weapons discovered on October 4, 2002.

23 Petitioner was charged with violating California Code of Regulations section 3006  
 24 making it a violation for an inmate to possess or have control over a weapon. Inmates are  
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26 <sup>16</sup>It is open to debate whether the reliability requirement could form the basis for relief in a  
 27 federal habeas action under § 2254(d) because this requirement emanates from the Ninth Circuit  
 28 rather than from the United States Supreme Court. Additionally, this requirement was developed in  
 the context of disciplinary decisions that were based on information received from confidential  
 informants, an issue not present in this case.

1 responsible for the contents of their cells and presumptively in possession of contraband found in  
2 their assigned area of responsibility.

3       Officer McChristian testified that she discovered the weapons between the sheets and  
4 mattress of Petitioner's bunk. As Lt. Kittner noted, Officer McChristian presented consistent  
5 statements to this effect on three separate occasions. (Resp't Ex. 2.) Lt. Kittner deemed Officer  
6 McChristian's statement credible. Officer McChristian's statement was sufficient to establish  
7 that contraband was discovered in Petitioner's assigned area of responsibility and, therefore, that  
8 Petitioner possessed the contraband. Although Inmate White could have had access to  
9 Petitioner's bunk, the notion that "constructive possession" provides "some evidence" of guilt  
10 when the contraband is found where only a few inmates have access is unproblematic. Howard,  
11 487 F.3d at 812 (quoting Hamilton v. O'Leary, 976 F.2d 341, 345 (7th Cir. 1992)); Mason v.  
12 Sargent, 898 F.2d 679 (8th Cir. 1990).

13       The Court finds that Officer McChristian's statement that she discovered the contraband  
14 between the mattress and sheets of Petitioner's bunk is sufficient to satisfy the "some evidence"  
15 standard and bears sufficient indicia of reliability. Therefore, it was not unreasonable for the Los  
16 Angeles Superior Court to find that the "some evidence" standard had been satisfied.

17       The Court DENIES Mr. Knight's Petition with respect to each of his due process claims.

18 **III. Claim for Interference with Access to Courts**

19       Petitioner submitted an appeal of Lt. Kittner's decision for a "third level review" also  
20 known as "Director's Level review" within the prison system. According to Petitioner, prison  
21 officials wrongly rejected this appeal on the ground that it was untimely in order to prevent him  
22 from exhausting his administrative remedies. Petitioner appears to contend that without this  
23 final level of review he will be unable to exhaust his administrative remedies, a prerequisite to  
24 obtaining judicial review of his claims. Petitioner, therefore, challenges the decision rejecting  
25 his appeal at the Director's Level on the ground that it wrongly interferes with his constitutional  
26 right of access to the courts.

1 The state court did not explicitly address this claim. This Court conducts an independent  
2 review of the record and determines whether the state court's implicit denial amounts to an  
3 unreasonable application of clearly established federal law as determined by the Supreme Court.

4 As Respondent points out, in order to present a claim that prison officials have interfered  
5 with Petitioner's constitutional right to access to the courts Petitioner must present evidence of  
6 actual injury. Lewis v. Casey, 518 U.S. 343, 346, 349 (1996). In this context, in order to  
7 demonstrate "actual injury" Petitioner must identify some instance in which he was prevented  
8 from presenting a claim to the courts. Id.; Sands v. Lewis, 886 F.2d 1166, 1171 (9th Cir. 1989)  
9 (must identify some specific instance in which inmate was actually denied access), overruled in  
10 part on other grounds by Lewis v. Casey, 518 U.S. 343, 350-53 (1996).

11 The Los Angeles Superior Court did not deny Petitioner's state habeas petition on the  
12 ground that he had not exhausted his administrative remedies. (Resp't Ex. 4.) Instead, the state  
13 court addressed the merits of his petition. Petitioner also has presented his claims to the  
14 California Courts of Appeal and the California Supreme Court. Neither of these courts purported  
15 to reject his petition for failure to exhaust administrative remedies. Moreover, by the present  
16 petition he now presents the substance of those claims in federal court. Because Petitioner has  
17 not been denied access to the courts, he cannot support this claim.

18 Accordingly, the state court's decision implicitly denying Petitioner's claim that prison  
19 officials have interfered with his right to access to the courts is not contrary to or an  
20 unreasonable application of clearly established federal law as determined by the Supreme Court.

21 The Court DENIES Mr. Knight's petition to the extent based on this claim.

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1 **IV. Conclusion**

2 For the foregoing reasons, the petition for a writ of habeas corpus is DENIED. The Court  
3 also DENIES Petitioner's February 22, 2008, Request for Judgment to Be Entered and Grant  
4 Writ (docket number 12). The Clerk of the Court shall enter judgment in accordance with this  
5 Order, terminate all pending motions, and close the file.

6 IT IS SO ORDERED.

7 Dated: 9/2/08

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9 SAUNDRA BROWN ARMSTRONG  
10 United States District Judge  
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1 UNITED STATES DISTRICT COURT  
2 FOR THE  
3 NORTHERN DISTRICT OF CALIFORNIA

4 KNIGHT,

5 Plaintiff,

6 v.

7 EVANS et al,

8 Defendant.  
9 \_\_\_\_\_/

Case Number: CV05-03670 SBA

**CERTIFICATE OF SERVICE**

10 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District  
11 Court, Northern District of California.

12 That on September 4, 2008, I SERVED a true and correct copy(ies) of the attached, by placing  
13 said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by  
14 depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office  
15 delivery receptacle located in the Clerk's office.

16 Clarence V. Knight C07508  
17 Salinas Valley State  
18 P.O. Box 1050  
19 Soledad, CA 93960

20 Dated: September 4, 2008

21 Richard W. Wieking, Clerk  
22 By: LISA R CLARK, Deputy Clerk  
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